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SPECIFIC PERFORMANCE OF CONTRACTS. DEFENCE OF LACK OF MUTUALITY.

Fifth Paper.

THE STATUTE OF FRAUDS.

The first section of the English Statute of Frauds[1] provides that "all Leases, Estates, Interests of Freehold, or Terms of Years, or any uncertain Interest of, in, to or out of any Messuages, Manors, Lands, Tenements, or Hereditaments, made or created by Livery of Seisin only or by Parole, and not put in writing, and signed by the parties so making or creating the same, or their Agents thereunto lawfully authorized by writing, shall have the Force and Effect of Leases or Estates at will only . . ." The fourth section declares that: ". . . no Action shall be brought . . to charge any person . . . upon any contract or Sale of Lands, Tenements or Hereditaments, or any Interest in or concerning them . . . unless the Agreement upon which such Action shall be brought, or

[1] 29 Car. II c. 3; 3 Stat. at Lar., p. 385.

some *Memorandum* or Note thereof, shall be in Writing, and signed by the Partie to be charged therewith, or some other Person thereunto by him lawfully authorized."[2] And finally the seventeenth section says that: ". . . . . no Contract for the Sale of any Goods, Wares and Merchandizes, for the Price of ten Pounds Sterling or upwards, shall be allowed to be good, except the Buyer shall accept part of the Goods so sold, and actually receive the same, or give something in earnest to bind the Bargain, or in Part Payment, or that some Note or *Memorandum* in Writing of the said bargain be made and signed by the Parties to be charged by such Contract, or their Agents thereunto lawfully authorized." The question discussed in this paper arises in those cases where only one party has signed the contract or memorandum of contract. Under the circumstances indicated the party who has signed cannot charge the other party either at law or in equity.[3] Can the party who has not signed successfully bring a bill in equity for the specific performance of the contract against the party who has signed? What effect in such a case has the objection of the defendant that there is "lack of mutuality"?

As bills for the specific performance of the sale of goods are only allowed when the goods have some peculiar value, the question is usually discussed in bills for the specific performance of contracts for the sale of an interest in real property, that is contracts falling under the fourth section above quoted. These I shall first examine. The first reported case is that of *Hatton* v. *Gray*.[4] The contract in that case was for the sale of certain houses. It was signed only by the defendant vendor. His counsel argued that: "The note binds not him who signed it not . . . . and therefore in equity cannot bind the other party, for both of them must be bound, or neither of them in

[2] Besides contracts concerning real property the fourth section deals with (1) Promises of Executors or Administrators to answer damages out of their own estates; (2) Promises to answer the debt or default of another; (3) Agreements made in consideration of marriage; (4) Agreements not to be performed within the space of one year.

[3] *Hawkins* v. *Holmes*, 1 P. Wms. 770, 1721.

[4] 2 Ch. Cas. 164, 1684.

equity." Yet the court granted the prayer of the plaintiff's bill without reported comment. It will be observed that the objection of the advocate is not that the remedy is not mutual, but rather that both have to be bound, that is that there must be mutuality in obligation in order to have specific performance.[5]

In the next reported case, *Coleman v. Upcot,*[6] the same result as in *Hatton* v. *Gray* is reached. Two reasons were given by the court for granting the prayer of the plaintiff's bill. The first was, that as the statute only speaks of the necessity for the signature of the party to be charged, and as the party to be charged had signed, the statute was satisfied. The second reason was that the plaintiff by his bill "hath submitted to perform what was required of his part to be performed." As one or the other of these reasons for granting specific performance in these cases has been repeated ever since, two facts connected with them should be pointed out. In the first place each reason is directed to a possible but distinct view of the Statute of Frauds. The first assumes that the statute is a statute relating to the evidence by which a certain class of obligations are to be proved. In reply to the objection that the plaintiff is not

[5] The argument therefore reflects the early idea that equity requires special mutuality of obligation in a contract before specific performance will be granted. See First Paper, May number, *supra,* page 270 *et seq.* for a discussion of this.

There is another part of this case, in 1 Eq. Cas. Abr., p. 21 sec. 10, which makes the court say, in answer to the objection that both or neither were bound in equity, "That it was decreed that they both were bound." This would appear to imply that the court was of the opinion, that where one party signed, he being bound, that fact bound the party who had not signed. They might also have thought that the plaintiff was bound because he had written the agreement, and so had in effect signed, though he had not put his name to the writing. This last is the view of the case taken by Powell in his Essay on Contracts, see pages 172, 173, 1790. It is usual to regard the case as standing for the proposition indicated in the report in "Cases in Chancery," namely, that if the defendant has signed, specific performance will be given, though the plaintiff has not signed. The case of *Capehart* v. *Hale,* 6 W. Va. 547, 1873, pp. 551-555, contains a good discussion of the two reports.

[6] 5 Vin. Abr. 527, 1707.

bound, this first argument contents itself with replying that the statute speaks only of the party to be charged. The view that the statute is a statute of evidence renders it unnecessary to show that the plaintiff is bound. It is sufficient to point to the words of the statute as indicating that the plaintiff has proved, in the method prescribed, that the defendant is under legal obligations to him. Years afterwards, in the well-known case of *Laythoarp* v. *Bayant*,[7] Chief Justice Tindal well expresses the argument which rests on this view of the statute when he says: "The defendant might have required the vendor's signature to the contract; but the object of the Statute was to secure the defendants, . . . I find . . . no reason for saying that the signature of both parties is that which makes the agreement. The agreement in truth is made before any signature." On the other hand, the argument that the plaintiff, by filing his bill renders himself liable to perform his part of the contract, assumes that the statute does affect the obligation of the parties. It admits that prior to the filing of the bill there is no obligation on the plaintiff's part, and seeks to avoid the effect of this admission, by pointing out, that at the time the bill is brought, the plaintiff is under obligation to the defendant.

In the second place it is to be noticed that both arguments are directed to the alleged lack of mutuality in the obligation of the parties. Neither argument has anything to do with the possible objection that there is lack of mutuality in the remedy. If the position taken in the first paper of this series is correct, namely, that the defence of lack of mutuality in the remedy as a special defence in equity did not appear until the nineteenth century, the fact that the court in *Coleman* v. *Upcot* confined itself to a discussion of the obligations of the parties, while it should not be forgotten, is not to be wondered at.

One or the other, or both, of the reasons above suggested for granting specific performance of contracts subject to the fourth section of the statute, though the plaintiff had not signed, seems to have satisfied the profession, for Lord

[7] 2 Bing. N. C. 735, page 743.

Hardwick, in *Buckhouse* v. *Crosby,*[8] a case involving the point, remarked, that he had often heard of the objection of lack of mutuality being offered in such cases and as often overruled.[9] This early practice was followed without question in two reported cases in the first years of the nineteenth century,[10] and we have the testimony of Sir James Mansfield that it was, in 1810, the common practice of the Court of Chancery.[11] This steady current of authority was disturbed by the remarks made by Lord Redesdale in the course of his opinion in *Lawrenson* v. *Butler.*[12] As heretofore explained this case did not involve any question under the Statute of Frauds.[13] It was impossible for the defendant in that case to fulfill his contract to the letter. The plaintiff was willing to accept and asked that the court force the defendant to fulfill the contract as far as he was able. The defendant owing to his own default could not have had specific performance of the plaintiff. Lord Redesdale dismissed the plaintiff's bill. The ground of his action was lack of mutuality, and in the course of his discussion of this subject he declares that the defence is also applicable to cases where the plaintiff has not signed the contract or memorandum of contract. Referring to *Hatton* v. *Gray,* he says, that there "it was considered as sufficient that the agreement should be signed by the party against whom the performance was sought, because such are the words of the Statute of Frauds; now, such certainty is the import that no agreement shall be in force, but it is signed by the party to be charged;

[8] 2 Eq. Cas. Abr. 32, pl. 44, 1736. Reported as *Backhouse* v. *Mohun* in a note to 3 Swanst., page 434.

[9] Another reported case is *Child* v. *Comber,* 3 Swanst. 423 note, 1723, and *dicta* in *Hawkins* v. *Holmes,* 1 P. Wm. 770, 1721. See also *Owen* v. *Davies,* 1 Ves. Sr. 82, 1747; but in this case part of the purchase money was paid.

[10] *Seton* v. *Slade,* 7 Ves. 265, 1802, sometimes spoken of as *Hunter* v. *Seton,* where Lord Eldon merely remarks that the signature of the party defendant "makes him within the statute a party to be charged." See also *Fowle* v. *Freemen,* 9 Ves. 351, 1804. A case before Sir Wm. Grant.

[11] *Allen* v. *Bennet,* 3 Taunt. 169.

[12] 1 Sch. & Lef. 13, 1802.

[13] First Paper, May number, *supra,* page 270.

but the statute does not say that every agreement so signed shall be enforced; the statute is in the negative. To give it this construction would, as I have heard it urged, make the statute really a statute of *frauds,* for it would have enabled any person who had procured another to sign an agreement to make it depend wholly on his will and pleasure whether it should be an agreement or not."[14] The strength of this argument lies in the assumption that the statute of frauds affects the obligations of the parties, and that the party who has not signed is in no way bound. Admitting this view of the statute, and remembering that at the time the case was decided there existed the idea that equity, to give specific performance, required a mutuality of obligation not necessary at law, the position of Lord Redesdale, that relief should not be given to the plaintiff who had not signed, would appear unanswerable.

In spite, however, of the force of the argument, assuming the view of the statute indicated, the settled practice to require only the defendant's signature, would have perhaps prevented even comment on the Irish case had it not been for the reputation of Lord Redesdale, and the fact that Lord Eldon, in view of *Lawrenson* v. *Butler,* expressly refused to state that the former practice of the court and his own decision in *Seton* v. *Stade* would be followed. In *Huddleston* v. *Briscoe,*[15] the Lord Chancellor lays emphasis on the fact that in the case before him the contract is signed by both parties, remarking that he does so because in a book, which he is persuaded will give much information to the profession upon many important points, he notes that Lord Redesdale has intimated a doubt whether the court would perform a contract, signed by one party, adding, "I remark the circumstance as I would not be understood to pass it by without observing that it is not necessary to discuss that here."[16]

[14] Page 20.

[15] 11 Ves. 583, 1805, page 592.

[16] The book referred to is Schoales and Lefroy's Reports of the Decisions in Ireland of Lord Redesdale, Vol. I. *Lawrenson* v. *Butler* is the only case in this book touching on the question. Lord Eldon must have seen the proofs of this work, as his decision in *Huddleston* v. *Briscoe* was rendered December 20, 1805, and the preface to the reports is dated June 30, 1806, the book being published in Dublin in that year.

In 1813 Vice Chancellor Plummer followed Lord Eldon in expressly pointing out that he did not have to decide the question in the case before him.[17] During the same year, however, Lord Redesdale's opinion was expressly repudiated in Ireland in the case of *Ormond* v. *Anderson,*[18] by Lord Chancellor Manners, on the ground that there does not exist any provision in the Statute of Frauds to prevent the execution of such an agreement. He however dismissed the plaintiff's bill in the case before him on other grounds. The next year Sir William Grant in *Western* v. *Russell,*[19] seems to regard the question as settled in favor of the plaintiff, though here again the question is not directly involved in the decision. In 1820, in *Martin* v. *Mitchell*[20] the fact that the plaintiff in a bill for the specific performance of a contract for the sale of land had not signed seems to have been urged by the defendant's counsel.[21] Sir Thomas Plummer, then Master of the Rolls, having decided the case against the plaintiff on the ground that it was an improvident contract entered into by ignorant persons who had been taken an unfair advantage of by the plaintiff, expressly states that he does not "mean to disturb the prevailing opinion that the party who has not signed may, nevertheless, file a bill and compel execution of the contract." And indeed in his examination of the subject, he states, in a clear manner, the argument against the defendant's contention, based on the conception of the statute as a statute relating to evidence. He says: "The doubt I have on that," the pretended lack of mutuality, "is whether there is not mutuality; the one party is to buy and the other to sell, and the contract is therefore in its nature mutual, though not evidenced by a writing binding on both.[22] Yet he at once confuses this argument with that which admits that the statute does affect the obligation, saying: "It is considered that when the party files the bill he does an act which will bind him and from that time there is

[17] *Stratford* v. *Bosworth,* 2 Ves. & B. 341, 1813, page 345.
[18] 2 Ball & B. 363, 1813, page 370.
[19] 3 Ves. & B. 187, 1814, page 192.
[20] 2 J. & W. 413.
[21] See reply of plaintiff's counsel, page 418.
[22] Page 426.

mutuality." And following this last conception of the statute he inclines to the opinion that before the party who has not signed, signs or brings his bill for specific performance, the other party who has signed is at liberty to recede.[23] In spite of the confusion of thought in this opinion, Sir Thomas Plummer does admit that it is settled that a plaintiff who has not signed can have specific performance. The conclusion has since been uniformly acquiesced in by the English courts.[24]

[23] Page 428. In the case before him the party who had not signed subsequently entered into a contract which she did sign, with the other party, to fulfill the first contract, and the court intimates, that as nothing was given for the signature by the defendant it was not binding on the plaintiff. See page 427. This seems to be a further application of the same theory.

[24] See *Boys* v. *Ayerst,* 6 Mad. 316, 1822, *dicta.* Vice-Chancellor Leach in this case, in admitting that the law is settled, expresses his surprise, for "although such an agreement may satisfy the words of the Statute of Frauds, yet a court of equity does not generally lend its assistance to enforce agreements which are not mutual." See also *Flight* v. *Balland,* 4 Rus. 298, 1828, page 301, *dicta; Palmer* v. *Scott,* 1 R. & M. 391, 1830; *Field* v. *Boland,* 1 D. & Wa. 37, 1837, Irish; *Sutherland* v. *Briggs,* 1 Hare, 26, 1841, *dicta; Semble, Dowell* v. *Dew, Morgan* v. *Halford,* 1 Sm. & Giff. 101, 1852, *dicta.* Since the case last cited the writer does not know of any English or Irish equity case in which the question has been raised by either court or counsel. Sir Thomas Plummer's suggestion that before bill filed the defendant can recede from the contract would seem not to be again referred to. It would mean that the filing of the bill made the contract. Beside the fact that there would not appear to be any reason for this fiction, it had already been distinctly rejected by Lord Eldon in *Gaskarth* v. *Lord Lowther,* 12 Ves. 107, 1805. There C. became the purchaser at auction of B.'s estate. The purchase not being completed, B. notified C. that if his conveyance was not accepted within a period stated, B. would not consider himself bound any further. Long afterwards B. again wrote to C., reminding him of his purchase and urging him to complete. C. brought a bill against B. for specific performance. In his answer C. denied the binding effect of the contract, but offered to perform. The decree was that C. should pay the purchase price into court before a day certain and obtain a conveyance, else his bill to stand dismissed. C. paid the money into court in accordance with this decree and died, leaving A. his devisee under a will made after the bill was filed, but before decree, and D. and E. his co-heirs at law. The question in the case was whether in equity the conversion had taken place at the date of the wills, wills carrying real property

It will be noted that, as in the early English cases, the defence of lack of mutuality, to which the court in *Martin* v. *Mitchell* replies, is not lack of mutuality in the remedy in equity, but in the obligation. I do not know of any English case, where the plaintiff has not signed, that raises the objection that there is no mutuality of equitable remedy. I believe this can be accounted for by the fact that the admission that it was finally settled, that the plaintiff who had not signed had a right to a bill in equity immediately preceded the decision of *Flight* v. *Bolland* which, as we have heretofore noted, was the first case to clearly announce the principle that in equity there must be mutuality of remedy.[25] As a result we may say that the modern defence of lack of mutuality in the remedy was born with the admission that it did not apply to cases under the fourth section of the statute where the plaintiff who had not signed sought specific performance. Thus the new phase of the defence of lack of mutuality was accommodated to the century and a half practice of the Court of Chancery, by the statement that the defence of lack of mutuality of remedy, only applied to cases where the remedy was not mutual at the time the decree was made.

The opinion of Lord Redesdale in *Lawrenson* v. *Butler,* had more influence in the United States than in England.[26] The case is first mentioned with approval by Chancellor Kent in *Parkhurst* v. *Van Cortlandt.*[27] There the plaintiff asked

possessed at the date of execution only. This question in turn depended on whether there was a contract between the parties at the date of the bill. The first contract, if any there was, had been abandoned by the first letter or communication mentioned. Lord Eldon thought that the second letter failed to make a contract. There being no contract in existence, Lord Eldon points out that the filing of a bill did not make a contract, and that there was no contract between the parties until C. accepted the alternative given him by the decree and paid the money into court. Hovenden in his annotations to Vesey's Reports points out the conflict of Sir Thomas Plummer's opinion with that of Lord Eldon.

[25] 4 Rus. 298, 1828. See First Paper, May number, *supra,* page 273.

[26] See for a discussion of the greater effect of the decision in America than in England in preventing the specific performance of contracts containing an option, Third Paper, August number, *supra,* page 448.

[27] 1 Johns. Ch. 273 (N. Y.), 1814, page 282.

for specific performance of a contract concerning lands which he had not signed. The defendant set up the statute of frauds, the fourth section of the English statute being then in force in New York. But the reason for the defendant's pleading the statute seems to have been, not the fact that the plaintiff had not signed, but the fact that the memorandum signed by the defendant was not sufficient under the statute. However, the citation of *Lawrenson* v. *Butler* seems to have had its effect, as shortly afterwards, in the case of *Benedict* v. *Lynch,*[28] the chancellor intimates, though the opinion was not necessary for the decision, that Lord Redesdale was correct in his application of the defence of lack of mutuality as defeating a plaintiff who had not signed. In support of this position the chancellor not only cites the case of *Huddleston* v. *Briscoe,* before Lord Eldon, but a case at law arising under the seventeenth section of the statute, *Champion* v. *Plummer.*[29] This citation of a case at law seems to show that the chancellor was not dealing with the question whether specific performance could be had of a contract signed only by the defendant, but with the more fundamental question, whether under the circumstance of one party only having signed, there is any contract at all. The arrangement of his opinion in *Clason* v. *Bailey* [30] also lends itself to the idea that the real question to be decided is whether there is any contract. *Clason* v. *Bailey* was a case at law under the seventeenth section. Chancellor Kent after an examination of cases at law and in equity under the fourth and seventeenth sections of the statute admits "There is nothing to disturb this strong and united current of authority," admitting the obligation of the

[28] 1 Johns. Ch. 370 (N. Y.) 1815, pages 373 and 374.

[29] There are two reports of this case, one 5 Bos. & P. (1 N. S.) 252, 1805, and the other 5 Esp. 240. It is from the last report that Chancellor Kent takes the case, and in this report Sir James Mansfield is made to seem to take the position that both the buyer and seller of goods should sign before either could be charged at law. The report in *Bosanquet and Puller* makes the court discuss an entirely different matter. In *Allen* v. *Bennett,* 3 Taun. 169, 1810, Sir James Mansfield himself declares that the fact that the plaintiff had not signed was not discussed in the earlier case.

[30] 14 Johns, 484 (N. Y.), 1817.

defendant though the plaintiff has not signed, but the observations of Lord Chancellor Redesdale in *Lawrenson* v. *Butler*.[31]

Subsequent to *Clason* v. *Bailey* the cases in equity discussing the defence of lack of mutuality to a bill for the specific performance of a contract relating to real property, where only the defendant has signed, fall into two classes. One class discusses the question of lack of mutuality of obligation as affecting the existence of the contract, ignoring the fact that there may be a good contract at law, but one which equity will not enforce.[32] In this class of cases specific performance is given, because the court thinks there is sufficient mutuality of obligation to make a good contract, the specific enforcement of the contract being taken for granted.[33] In

[31] Page 488. It is doubtful however whether Chancellor Kent did confuse in his own mind the question of the existence of a contract and its specific performance in equity, for on page 487 he seems to approve of the cases at law, while on pages 488, 490, though he admits that it appears to be settled that the plaintiff can have specific performance, he expresses the opinion that the weight of the argument is against the relief.

[32] Examples of this class are *Getchell* v. *Jewett*, 4 Green, 350 (Me.) 1826, pages 366, 367; *M'Crea* v. *Purmort*, 16 Wend. 460 (N. Y.), 1836, page 465; *Old Colony R. R.* v. *Evans*, 6 Gray, 25 (Mass.) 1856, pages 31, 32 and 33; *Farwell* v. *Lowther*, 18 Ill. 252, 1857, page 255; *Esmay* v. *Gorton*, 18 Ill. 483, 1857, page 486; *Chambers* v. *Alabama Iron Co.*, 67 Ala. 353, 1880; *Carskaddon* v. *Kennedy*, 40 N. J. Eq. 259, 1885; *Miller* v. *Cameron*, 15 Atl. 845 (N. J.), 1888. In the following cases the validity of the contract as such was discussed, the word mutuality not being used in connection with the circumstance that the plaintiff had not signed. The question of specific performance of such contracts, granting they were good at law, seems to have been taken for granted. *Perkins* v. *Hadsell*, 50 Ill. 216, 1869, page 220; *Capehart* v. *Hale*, 6 W. Va. 547, 1873; *Marqueze* v. *Caldwell*, 48 Miss. 23, 1873, overruling in *Lee* v. *Dozier*, 40 Miss. 481, 1865.

[33] In regarding the contract as good when proved only by the signature of the party defendant, the cases in the previous note are followed by cases at law where the suit is on a contract falling under the fourth section of the English statute, or similar enactments in this country. See for example *Mirzell* v. *Burnett*, 4 Jones 249 (N. C.), 1857; *Ballard* v. *Walker*, 3 *Johns*, 60 (N. Y.) 1802; Hanson v. Barnes, 3 Gill & Johnson, 359 (Md.), 1831; *Kizer* v. *Locke*, 9 Ala. 269, 1846; *Mirzell* v. *Barnett*, 4 Jones 249 (N. C.), 1857; *Luckett* v. *Williamson*, 37 Mo. 388, 1866.

the second class of cases the question discussed under the defence of lack of mutuality, is not whether there is a good contract, but whether, admitting this to be so, there is not sufficient lack of mutuality in the remedy to prevent a court of chancery from granting specific performance. The earliest case of this class is *Rogers* v. *Saunders*.[34] Here there is a clear separation of the question whether there is a good contract, from the question of its specific enforcement, though the only explanation of why equity grants specific performance is that the court find a contract legally binding.[35] Other cases of this class grant specific performance on the ground that the words of the statute indicate that a defendant who has signed can be charged in equity as well as at law.[36]

In *Vassault* v. *Edwards*,[37] the court holds, that the act of filing the bill makes the remedy mutual. It will be noted that these explanations of why specific performance should be granted, in spite of the objection of lack of mutuality in the remedy, are identical with those given in the early English cases, when the objection was not to lack of mutuality in the remedy in equity, but to lack of mutuality in the obligation. They have no relation to the objection of lack of mutuality in the remedy. To this objection perhaps the best reply is the one found in the case of *Ives* v. *Hazard*[38] that "mutuality of remedy existing at the time action is brought is all that is required to enable a plaintiff to maintain his action."[39] This is not exactly an answer, but it is, as we have seen, in accord with the fact that the idea of mutuality

[34] 16 Me. 92, 1839.

[35] Page 97. See also *Shirley* v. *Shirley*, 7 Black, 452 (Ind.), 1845; *Moses* v. *McClain*, 2 S. 741 (Ala.), 1887.

[36] See *Martin* v. *Grimes*, 88 Mo. 478, 1885. The case of *McPherson* v. *Fargo*, 74 N. W. 1057 (S. D.), 1898, proceeds on the same reason, but there is a statute in the jurisdiction expressly giving specific performance where only the defendant has signed. See Sec. 4630 Comp. Laws.

[37] 43 Cal. 458, 1872, page 465, counteracting the opposite inference to be drawn from the language of the same court in *Cooper* v. *Penna.*, 21 Cal. 403, 1863.

[38] 4 R. I. 14, 1855.

[39] Page 28. See also *Estes* v. *Furlong*, 59 Ill. 298, 1871, page 302.

of remedy in equity as we now know it, grew up after the practice of granting specific performance to a plaintiff who had not signed was well established.

Whether the court discusses lack of mutuality in the obligation, or lack of mutuality in the remedy in equity, the objection is always decided against the defendant. It is a general rule where the fourth section of the English statute of frauds is in force, that the fact that the plaintiff has not signed the contract does not prevent him from having specific performance, provided the defendant has signed it. This general trend of authority is followed in cases where the defence of lack of mutuality is not raised, or if raised, is not discussed.[40]

Apparently the only state, having the fourth section of the statute, to follow Lord Redesdale's opinion is Maryland.[41] As seen elsewhere[42] the cases of *Geiger* v. *Green*[43] and *Tyson* v. *Watts*,[44] decided in 1846 and 1847 respectively, introduced the idea of mutuality for which *Lawrenson* v. *Butler* stands. Therefore in 1850 in *Duvall* v. *Myers*,[45] the court, quoting at length from *Geiger* v. *Green*, and *Lawrenson* v. *Butler*, refuses to give specific performance of contract for the sale of standing timber, against a vendee who had signed, at the instance of a vendor who had not,

[40] **Jones* v. *Robbins*, 29 Me. 351, 1849; **Plunkett* v. *The Methodist Soc.*, 3 Cush. 561 (Mass.), 1849; **Parker* v. *Perkins*, 8 Cush. 318 (Mass.), 1851; **Murphy* v. *Marland*, Ib. 573, 1851; *Johnson* v. *Dodge*, 17 Ill. 433, 1856; **Barnard* v. *Lee*, 97 Mass. 92, 1867; **Ewins* v. *Gordon*, 49 N. H. 444, 1870; *Howland* v. *Bradley*, 38 N. J. Eq. 288, 1844 (settling doubt expressed in *Laning* v. *Cole*, 4 N. J. Eq. 229, 1842); *Wilks* v. *Georgia, Pacific R. R.*, 79 Ala. 180, 1885; *Linn* v. *McLean*, 85 Ala. 250, 1887, *dicta*; *Ross* v. *Parks*, 93 Ala. 153, 1890. The cases marked thus (*) are cases in which the defendant had signed a bond conditioned to convey, and the plaintiff had not signed anything.

[41] The English Statute of Frauds is in force in Maryland, not because of any legislative enactment, but merely because it is held to be one of the English statutes applicable to, and therefore enforced in the state.

[42] Third Paper, August number, *supra*, 452.

[43] 4 Gill. 472, 1846.

[44] 1 Md. Ch. 13, 1847.

[45] 2 Md. Ch. 401.

because the agreement, being only signed by one, is not "obligatory on both parties."[46]

In 1830 the State of New York, which had had before that date the English statute of frauds, revised her laws. In place of the fourth section of the English statute the following was adopted: "Every contract for the leasing for the longer period than one year, or for the sale of any lands, or any interest in lands, shall be void unless the contract or some note or memorandum therefore expressing the consideration be in writing and be subscribed by the party by whom the lease or sale is to be made."[47] This statute, which makes the signature of the vendor, not the party to be charged necessary, is now in force in several of the states and territories.[48] In Tennessee the words "party to be charged" have been held to mean the party who owns the land.[49] In these states, where the owner of the land has signed the memorandum, the defence of lack of mutuality cannot be properly raised by either party. If the vendee is defendant he cannot say that he could not enforce the obligations of the vendor, and if the vendor is defendant the fact that the vendee has not signed, does not enable him

[46] Page 405. The fact that the court seems to have been unaware that Lord Redesdale's opinion was not generally followed, and the fact that the memorandum signed by the defendant was hardly sufficient under the statute, takes some value from the case. But the writer cannot find that it has been reversed. Indeed the subsequent application of the theory of lack of mutuality to defeat a plaintiff who held an option would appear to render such reversal improbable. See *Rider* v. *Gray*, 10 Md. 282, 1856, Third Paper, August number, *supra*, page 453.

[47] Stat. at Large, Part II, Chap. vii, title 1, sec. 8. There was a slight change in the phraseology of the enactment in 1896. See *N. Y.* Rev. Stat., Vol. 5, page 3588, § 224, but the requirement respecting the signature of the owner was retained.

[48] Colorado, Florida, Idaho, Kansas, Michigan, Minnesota, Nevada, Ohio, Oklahoma, Oregon, Utah and Wisconsin. It was in force in California from 1850 to 1873. The fourth section of the English statute is in force, though slightly different phraseology is used, in all other states and territories except New Mexico, Pennsylvania and Washington.

[49] *Frazer* v. *Ford*, 2 Head. 464, 1859.

to assert that if he was plaintiff he would be powerless to enforce the plaintiff's obligation.[50]

Where, however, the vendor who has not signed is plaintiff, two objections can be raised to granting his bill. One is the objection that the statute requires the signature of the vendor, making no distinction between the case where the vendor is plaintiff and where he is defendant. This would appear to be the attitude of the New York Courts. The cases in the notes seem to assume, that if the vendee has not signed there is no contract for equity to enforce.[51] The other objection that could be raised to the plaintiff's bill is that, though the statute means to require the vendor's signature only in case he is a party defendant, the fact that the vendor has not signed would prevent the enforcement of the contract against him, and therefore there is lack of mutuality. As far as the writer knows the defence as indicated has not been raised in any jurisdiction having the New York statute.

In Pennsylvania, however, in an analogous but not identical case, the defence of lack of mutuality has been successfully raised. The first three sections of the English statute of the frauds are in force in that State. The fourth section is not in force. As a consequence of this peculiarity the courts of the state have taken the position that one who entered into a parole contract for the sale or purchase of an interest in land can at law sue for damages for a breach of the same.[52] The remaining question is whether specific performance can be had of such a contract. The first case which carefully considers this subject is that of *Wilson* v. *Clarke*.[53] There

[50] *Semble Bigler* v. *Baker,* 38 N. W. 1026 (Neb.), 1894. The impossibility of raising the defence of lack of mutuality in case the vendor has signed and the difference between the statutes requiring the signature of the vendor and the fourth section of the English Statute of Frauds seems to have been overlooked by the Supreme Court of Nebraska in *Gartrell* v. *Stafford,* 12 Neb. 545, 1882.

[51] *Champlin* v. *Parrish,* 11 Paige, 408 (N. Y. Ch.), 1834. The point is assumed in *McWhorter* v. *McMahan,* 10 Paige, 393 (N. Y. Ch.), 1842.

[52] See Pennsylvania cases cited in this Paper.

[53] 1 W. & S. 554 (Pa.), 1841. See also *Irvine* v. *Bull,* 4 Watts, 287 (Pa.), 1835, and *Ellet* v. *Paxson,* 2 W. & S. 418, 1841.

A. and B. entered into a parole agreement whereby A. agreed to sell and B. to buy certain land. A. offered B. a deed which B. refused. As the action of assumpsit is used in the state as a substitute for a bill in equity, where the plaintiff would in equity demand the payment of a sum of money, A. sued B. in assumpsit for the full contract price of the land.[54] The court treat the case as if the vendor had brought a bill in equity for specific performance. It will be noted that the court had before them the same question which arises in England and other jurisdictions, having the fourth section of the statute of fraud, where the plaintiff who has not signed seeks to enforce the contract against the defendant who has. Cases at law of the type of *Clason* v. *Bailey* decide that there is a good contract at law if only the defendant has signed. The absence of the fourth section in Pennsylvania makes the contract good at law though neither party has signed. When, therefore, in *Wilson* v. *Clarke,* the Supreme Court of Pennsylvania had before them a case where the vendor in effect asked specific performance, they had before them a case in which the vendor could recover at law, but because of the first section of the English statute of frauds, the vendee could not have had specific performance in equity. This is the conception which Judge Gibson had of the case before him. He regarded it as one involving the question of mutuality as a defence in equity and he relies in his decision on Lord Redesdale's criticism of the practice in England of granting specific performance when only the defendant has signed. He points out that while the contract would be, as stated, recognized at law, the existence of the first section of the English statute would prevent the defendant from securing the land. This fact he regards as fatal to the present action, because ". . . it is a cardinal principle that a chancellor, when uncontrolled by arbitrary enactment, executes no contract which is not the source of mutual obligation and mutual remedy." He acknowledges the fact that the early English practice was to give specific performance to a plain-

[54] He also moved on the trial of the cause for leave to file a new count charging the defendant with damages for breach of contract. This the trial court refused. For this cause the judgment was reversed.

tiff who had not signed, and that the opinion of Lord Redesdale had not been adopted in England or in New York, but this admission only adds force to the decision, as one of the few which on careful consideration have adopted Lord Redesdale's views.[55]

A curious misapplication of the ideas of Judge Gibson and Lord Redesdale was made by one of the courts of Common Pleas of the state in the case of *Parrish* v. *Koons*.[56] A bill for specific performance was filed by the vendor of real estate. The court decided that the vendee had not signed.[57] It was also held that the buyer had to sign in order to place him in a position of being forced to accept an estate in the land, because the first section of the statute speaks of "parties or their agents thereunto lawfully authorized in writing." This position that an estate cannot be vested in a man who has not signed the contract because of the wording of the first section of the statute ended the case before the court. It was at the time contrary to the position already assumed by the Supreme Court of the state in *Lowry* v. *Mehaffy*.[58] Not content, however, with this disposition of the case, the court goes on to point out, as an additional reason for refusing the plaintiff's bill, that "mutuality of obligations

[55] The force of the repudiation of the idea that a plaintiff who has not signed cannot have specific performance is hardly weakened by the fact that Judge Gibson yielded to the peculiar temptation of all judges to distinguish between the case before him and the cases which he was in effect refusing to follow. He points out that the English and New York cases all discuss the effect of the fourth section of the English statute, requiring that contracts concerning land or some note thereof, shall be in writing "signed by the party to be charged," and that it is upon the use of the words "party to be charged," that the cases giving specific performance to the plaintiff who has not signed have been decided. Of course, the *reductio ad absurdum* of this reasoning is that it uses the fact that the English statute requires contracts concerning land to be proved by writing, when the Pennsylvania statute does not as a reason for refusing in the latter case the specific performance which is granted in the former.

[56] 1 Pars. Eq. Cas. 78 (Pa.) 1844.

[57] A memorandum had been signed by the agent of the vendee, but the agent had not been constituted as such by the vendee in writing.

[58] 10 Watts. 387 (Pa.) 1840. There is, however, ground for the position taken in *Parrish* v. *Koons* that this case was a case of sufficient part performance to take it outside of the statute.

in contracts sought to be specifically performed, is an essential requisite to authorize equitable intervention between the parties.[59] This application of the idea of mutuality is unique. Since the plaintiff had signed, there was no question but that specific performance could be had against him. It may be that the statute required the vendee's signature, but certainly there was no question of lack of mutuality. The plaintiff by signing had fulfilled the requirement of the statute. Yet the idea of the court seems to be that since, had the plaintiff not signed, no relief could be given against him, having signed, he should have no relief against a purchaser who had not signed.[60]

Of course, in a case in Pennsylvania like *Parrish* v. *Koons,* where the plaintiff vendor only has signed, no question of lack of mutuality can properly arise. If the position taken in that case is adopted, namely that the first section of the statute requires the defendant vendee to sign in order to create an interest in land, the vendor who has signed should fail to force the land on the vendee because a positive requirement of the statute is lacking, not because of lack of mutuality. On the other hand, if the position generally assumed is correct, that the first section of the statute only requires the signature of the grantor or vendor in cases where he is party defendant, then the vendor, having signed, can have specific performance, and specific performance can also be had against him, and no question of mutuality of remedy or obligation is raised. As a matter of fact the position of *Parrish* v. *Koons* has never been adopted by the Supreme Court of Pennsylvania. On the contrary there are several decisions subsequent to that case in effect granting specific performance to the vendor or vendee in a contract concerning land, where only the vendor has signed.[61] On the other hand the

[59] Page 89, citing *Lawrenson* v. *Butler.*

[60] Page 897. The position taken in *Parrish* v. *Koons* that the vendee must sign in order to give him an interest in the land which a court of equity can enforce in his favor or against him was apparently approved by *dicta* in another county court decision, *Patton* v. *Develin,* 2 Phila. 103 (Pa.) 1856.

[61] M'Farson's App., 11 Pa. 503, 1849, vendee plaintiff, *Shoofstall* v. *Adams,* 2 Grant, 209, 1858, vendee plaintiff; *Tripp* v. *Bishop,* 56 Pa. 424, 1867, vendor plaintiff; *Johnston* v. *Cowan,* 59 Pa. 275, 1868, vendor

position of Judge Gibson in *Wilson* v. *Clarke* has been consistently followed and specific performance denied to the vendor of a parole contract concerning land.[62] In Pennsylvania, therefore, the influence of Lord Redesdale's opinion, and the eighteenth century ideas of lack of mutuality there involved is still felt. Were the fourth section of the statute to be adopted in the state, the court would have to reverse the principle on which they now deny specific performance to the vendor in a parole contract relating to land; if they desired to follow other jurisdictions in permitting specific performance to a plaintiff who has not signed. In this connection it is well to remember, that though the cases of *Wilson* v. *Clarke* and *Bodine* v. *Glading* introduced the eighteenth century ideas of lack of mutuality as a defence in equity, the courts of the state, while, as we have just seen applying those ideas to cases under the statute, refuse to apply them to the case where the plaintiff seeks to enforce an option.[63] At the same time it may be remarked that there has been no confusion and contradiction in the decisions of the Supreme Court of the state. The assumption that such was the case by the late Judge Reed,[64] being due to his failure to distinguish between parole agreements and those in which the vendor has signed.

Turning to the specific performance of contracts affected by the seventeenth section of the English statute of frauds,

plaintiff; Smith's App., 69 Pa. 474, 1871, vendee plaintiff; Cadwalader's App., 81 Pa. 194, 1876, *dicta,* as the contract was signed by both; *Swisshelm* v. *The Swissvale Laundry Co.,* 95 Pa. 367, 1880, vendor plaintiff (the part of the case under the contract signed by vendor).

[62] *Meason* v. *Kaine,* 63 Pa. 335, 1869. *Sands* v. *Arthur,* 84 Pa. 479 1877; *Sausser* v. *Steinmetz,* 88 Pa. 324; 18??; *Swisshelm* v. *The Swissvale Laundry Co.,* 95 Pa. 367, 1880. (The part of the case on the verbal contract.) It is curious to note that in *Meason* v. *Kaine,* a case which is identical with *Wilson* v. *Clarke,* the former case is not mentioned, but the ideas of Lord Redesdale, which defeat the plaintiff, are introduced through the medium of the case of *Bodine* v. *Glading,* 21 Pa. 50, 1853. A case which has nothing to do with the statute of frauds, but is identical with *Lawrenson* v. *Butler,* and which we have discussed in the Third Paper, August number, *supra,* page 453, *et seq.*

[63] *Corson* v. *Mulvaney,* 49 Pa. 88, 1865, and case discussed, Third Paper, August number, *supra,* page 455.

[64] Reed, Statute of Frauds, sec. 367.

we find that there is a difference between the language of the two sections. While the fourth section declares that the memorandum must be signed by the "party to be charged," the seventeenth section uses the words "parties to be charged." Whether the seventeenth section requires the signature of both parties, or whether the word is used in the sense that there may be more than one party defendant, which is much more likely to be the case in a contract concerning goods than in a contract concerning land, is not an equitable but rather a legal question. The statute applies to suits at law, as well as equity. If at law it had been held that both plaintiff and defendant must sign, equity would have no reason for granting specific performance where only the defendant had signed. But it has been generally held at law, on both sides of the Atlantic that the word "parties" in the seventeenth section means party or parties defendant, and that there is no difference in this respect between the two sections of the statute.[65]

[65] Apparently the first reported case involving the question is *Saunderson* v. *Jackson,* 2 Bos. and Pa. 238, 1800. Another early case is *Egerton* v. *Matthews,* 6 East. 307, 1805. In neither case was the fact that the plaintiff had not signed adverted to by court or counsel. This statement appears to be also true of a third early case, *Champion* v. Plummer, 5 Bos. and Put. 252 (1 N. S. 1805, in spite of a contrary report in 5 Espanasse, 240; see *supra,* note 29. In the case of *Alber* v. *Bennet,* 3 Taun, 169, 1810, the question was raised and decided against the defendant. See also *Liverpool Borough Bank* v. *Eccles,* 4 *H. & N.* 137, 1859. Some of the American cases are: *Douglass* v. *Spears,* 2 Nott & McCord, 207 (S. C.) 1819; *Barstow* v. *Gray,* 3 Greenleaf, 409 (Me.) 1825, *dicta; Russell* v. *Nicoll,* 3 Wend. 117 (N. Y.) 1829; *Davis* v. *Shields,* 26 Wend. 341 (N. Y.) 1841; *Smith* v. *Smith,* 8 Blackford, 209 (Ind.) 1847; *Cummings* v. *Dennett,* 26 Me. 397, 1847, *dicta; Linton* v. *Williams,* 25 Ga. 391, 1858; *Morin* v. *Martz,* 13 Minn, 191, 1868; *Wemple* v. *Knopf,* 15 Minn. 440, 1870, *dicta; Brooklyn Oil Refinery* v. *Brown,* 38 How. Prac. 444, 1870. In these states when the above cases were decided, either the seventeenth section of the English statute was in force, or the words "parties to be charged" were used in an analogous section. At the present time the great majority of the states not adopting the New York statute, while they require contracts for the sale of goods to be manifested in writing, use the words of the fourth section of the English statute in requiring the signature of the *party* to be charged. This is now true of Arkansas, California Indiana, Georgia, Iowa, Maine, Massachusetts, Mississippi, New Hampshire, New Jersey,

As a result of this attitude of the courts of law, there would appear to be no question, except in Maryland, that in spite of the seventeenth section, whether the statute in the jurisdiction uses the word party or the word parties, the defendant having signed a contract for the sale of goods, the contract being one that a court of equity would otherwise enforce, the plaintiff who has not signed can have specific performance. Owing to the fact that contracts for the sale of goods are rarely subject to specific performance in any event, cases where a plaintiff who has not signed has sought specific performance are almost unknown. The question is elaborately discussed in *Woodward* v. *Aspinwall*,[66] the opinion of the court being favorable to the plaintiff, though his bill was dismissed on another ground. It again arose in *White* v. *Schuyler*,[67] when the opinion in the former case was followed. Of course in the states where the seventeenth section of the English statute is not in force, if a plaintiff asks for the specific performance of the sale of goods, no question under the Statute of Frauds can arise.[68]

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Oregon, Vermont, Washington and Wyoming. As there are several states (see *infra*) where the seventeenth section is not in force, the question can now only arise in states adopting the New York statutes, which use the word parties, and in Missouri, South Carolina and Maryland, where the English statute in its entirety is in force. Michigan, which adopts the New York statute, uses the word party in dealing with contracts for the sale of goods.

[66] 3 Sand. S. C. R. (N. Y.) 272, 1849.

[67] 1 Abb. Pr. N. S. 300, 1 (N. Y.) 1865.

[68] The seventeenth section is not in force in Alabama, Delaware, Illinois, Kansas, Kentucky, North Carolina, Ohio, Rhode Island, Tennessee, Virginia and West Virginia.